UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

LIQUID TRANSPORTERS, INCORPORATED

Employer

and Case 9-RC-16573

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS
LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION,
ORDER
AND
DIRECTION OF SECOND ELECTION

On July 3, 1995, the Acting Regional Director issued a *Decision and Direction of Election*, herein called the Decision, directing an election among certain employees of the Employer. [1]/ Thereafter, on July 19, 1995, the Petitioner filed a Request for Review of the Decision with the Board. On August 2, 1995, an election was conducted among the employees in the unit found appropriate in the Decision and the ballots were impounded pending the Board's ruling on the Petitioner's July 19, 1995 Request for Review. On August 31, 1995, the Board issued an Order finding that the Petitioner's July 19, 1995 Request for Review raised substantial issues concerning the continued viability of *Greenhoot, Inc.*, 205 NLRB 250 (1973), and remanded this matter to the Regional Director to ascertain facts concerning the status of owner-operators, who may be joint employers or supervisors of third party drivers, and to issue an appropriate supplemental decision. Pursuant to the Board's August 31, 1995 Order, a hearing was conducted on October 10, 1995, herein called the remand hearing, before a hearing officer at which time the Employer contended that the owner-operators who employed third party drivers should be excluded from the unit because they were statutory supervisors. [2]/ On March 15, 1996, the undersigned issued a Supplemental Decision finding that the Employer and the owner-

[1]/ The unit found appropriate in the Decision was: "All drivers, including owner-operators, employed by the Employer at its Louisville, Kentucky terminal, excluding all office clerical employees, mechanics and wash rack technicians, and all professional employees, guards and supervisors as defined in the Act."

[2]/ It appears that prior to the remand hearing, the parties were in agreement that the owner-operators should be included in the unit and that neither of them raised an issue regarding the eligibility of owner-operators who employed third party drivers.

operators were joint employers of the third party drivers and that the owner-operators who employed third party drivers were statutory supervisors. Thereafter, on March 29, 1996, the Petitioner filed a Request for Review of the Supplemental Decision asserting, among other things, that the undersigned erred by finding that the owner-operators who employ third party drivers were supervisors. On September 14, 2000, the Board issued an Order remanding this matter to the Regional Director for reconsideration in light of its decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000).

On November 9, 2000, the undersigned issued an Order approving a stipulation of the parties in which they agreed to the appropriate unit and to open and count certain impounded ballots. In my Order approving the stipulation, I directed that the impounded ballots cast in the August 2, 1995 election be opened and counted and a tally of ballots issue in the following unit appropriate for purposes of collective bargaining, herein called the Unit:

> **All drivers, including owner-operators and third party drivers, employed by the Employer at its Louisville, Kentucky terminal, but excluding all office clerical employees, mechanics, wash rack technicians and all professional employees, guards and supervisors as defined in the Act.**

On November 30, 2000, the impounded ballots were opened and counted and a tally of ballots was made available to the parties which disclosed the following results:

Approximate number of eligible voters.....	44
Number of void ballots.....	0
Number of votes cast for the Petitioner.....	19
Number of votes cast against participating labor organization...	15
Number of valid votes counted.....	34
Number of challenged ballots.....	0
Number of valid votes counted plus challenged ballots.....	34

On December 7, 2000, the Employer filed timely objections to conduct affecting the results of the election, herein called the Objections, which were duly served on all parties in conformity with the Board's Rules and Regulations, herein called the Rules.

Pursuant to the provisions of Section 102.69 of the Rules, an investigation of the issues raised by the Objections was conducted under the direction and supervision of the undersigned who, after carefully considering the results thereof, issues the following decision:

THE OBJECTIONS

The Objections essentially allege:

1. The Regional Director and the Board, in effect, have allowed statutory supervisors within the meaning of Section 2(11) of the Act to vote in a Board-conducted election along with unit employees, and therefore have unreasonably interfered with the employees' ability to exercise a free and reasoned choice in the election, therefore affecting the outcome of the election. The fact that the number of these supervisory ballots exceeds the slight difference between votes ultimately cast for, and against, the Petitioner only serves to exacerbate an already unfortunate scenario.

2. The Board has allowed a lapse of over five (5) years from the initial scheduled election on August 2, 1995, to the ballot count on November 30, 2000; during this enormous passage of time, the bargaining unit has largely evaporated, therefore, severely hampering any effective probability of meaningful collective bargaining.

OBJECTION 1:

In support of this Objection, the Employer asserts that six owner-operators who employ third party drivers cast unchallenged ballots in the election which were commingled with the ballots of eligible voters.

The investigation discloses that at the election, the parties' observers used a list of eligible voters to check off the names of persons casting ballots. The names of Raymon Day, George Wilkerson, James Mattingly, Austin Wooten, Jr., Billy Smith, Sr. and Samuel Curl appeared on the list of eligible voters with check marks next to their names which indicates that they cast unchallenged ballots in the election. There is no evidence that any party attempted to challenge the ballots of these six persons whom the undersigned in the Supplemental Decision excluded from the unit on the basis that they are supervisors. [3]/

Relying on *Walter Packing, Inc.*, 241 NLRB 131 (1979); *Medina County Publications*, 274 NLRB 873 (1985) and *Drukker Communications*, 299 NLRB 856 (1990), the Employer maintains that the election should be set aside because the six ballots cast by persons ineligible to vote and commingled with the ballots of eligible voters are sufficient in number to render impossible a determination as to whether the Petitioner received a majority of the valid votes cast. In each of those cases, unchallenged ballots were cast by persons at a time when they had been determined to be an eligible voter [4]/ but the results of the elections were ultimately found to

[3]/ As noted above, the issue as to the supervisory status of these owner-operators who employ third party drivers was not raised by any party until after the election. In the Supplemental Decision, I rejected the Petitioner's contention that the Employer was barred from litigating that issue.

[4]/ In *Walter Packing*, the determination occurred when a challenge to a ballot was overruled; in *Medina County*, it was contained in a Regional Director's Decision and Direction of Election, see 735 F.2d 199 (6th Cir. 1984); and in *Drukker Communications*, it took the form of the parties' election agreement.

be invalid upon a subsequent finding that such voters were ineligible and that their votes were determinative of the results of the election.

The Petitioner, on the other hand, cites *A. J. Tower Company*, 329 U.S. 324, 19 LRRM 2128 (1946); *Oppenheim Collins & Co.*, 108 NLRB 1257 (1954); *Crown Machinery Company, Inc.*, 205 NLRB 237 (1973) and *Prior Aviation Service, Inc.*, 220 NLRB 460 (1975), in support of its position that this Objection should be overruled on the basis that it is in the nature of post election challenges to ballots which the Board does not permit.

The cases relied upon by the Petitioner are distinguishable inasmuch as none of them involved a post election determination that persons who cast unchallenged ballots were ineligible to vote as is the situation in the instant case as well as in the cases cited by the Employer. Moreover, it was the Board, rather than the Employer or the Petitioner, which in its Order of August 31, 1995 initially raised the issue of the supervisory status of the owner-operators who employ third party drivers and no request for review was taken of my conclusion in the Supplemental Decision that the supervisory issue was properly before me. Under such circumstances, the issue raised in this Objection regarding the commingling of the ballots of ineligible voters does not raise an issue concerning post election challenges in the sense contemplated by the precedents relied upon by the Petitioner.

The appropriate unit set forth in the Decision specifically included owner-operators and prior to the election, no issue had been raised as to the supervisory status of any of them. Under these circumstances, the election was conducted on the basis that the owner-operators were eligible to vote. It was not until after the election was conducted, and the ballots were impounded, that the Board in its August 31, 1995 Order, for the first time, raised the issue of the supervisory status of the owner-operators who employ third party drivers. At the remand hearing, the Employer contended for the first time that the owner-operators who employ third party drivers were supervisors and in the Supplemental Decision, I found, contrary to the contention of the Petitioner, that the supervisory issue was properly before me and concluded that the owner-operators who employ third party drivers were, in fact, supervisors within the meaning of the Act. These events have resulted in ballots cast by persons who were not challenged at the time of the election, but who were determined after the election to be ineligible to vote, to be commingled with the ballots of eligible voters. In accordance with the Employer's position, I conclude that the commingling of the ballots of the six ineligible voters makes it impossible to determine whether the Petitioner received a majority of the valid votes cast in the election and that the election must be set aside. See, *Walter Packing, Inc*., supra.

The Employer further maintains that the presence of these six supervisors at the polls warrants setting the election aside. Except for pointing out that the six supervisors cast ballots in the election, the Employer did not furnish any evidence of the circumstances surrounding their presence or conduct at the polls. Thus, there is no evidence concerning the extent to which eligible voters may have been aware of or affected by the presence of these supervisors at the polls. Furthermore, the fact that both parties at the time of the election viewed the six persons as being eligible voters would tend to mitigate any effect that their presence at the polls may have had on eligible voters. The Board has held that an employer's brief foray into a polling area, standing alone, may not tend to interfere with the employees' free choice in an election.

Performance Measurement Company, 148 NLRB 1657, 1659 (1964). See also, *Marathon Metallic Building Company*, 224 NLRB 121, 125 (1976). Likewise, a party may not ordinarily rely on its own conduct as a basis for setting an election aside. *B. J. Titan Service Company*, 296 NLRB 668 (1989). Accordingly, I conclude that the presence at the polls of the six owner-operators, who employ third party drivers, does not afford any basis for setting the election aside.

In view of the foregoing, I conclude that the commingling of the ballots of eligible and ineligible voters requires that the election be set aside. Accordingly I shall sustain Objection 1, on this basis, and direct a second election.

OBJECTION 2:

In support of this Objection, the Employer submitted evidence that on the date of the election at its Louisville terminal, it employed 14 company drivers of whom only 2 continued to be employed on November 9, 2000, 24 single owner-operators of whom only 9 were employed on November 9, 2000, 8 single-owner operators with third party drivers of whom only 4 remained employed on November 9, 2000 and 10 third party drivers of whom only 5 were employed on November 9, 2000. Relying on *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77 (9th Cir. 1977) and *Burns International Security Services*, 567 F.2d 945 (10th Cir. 1977), the Employer asserts that the turnover of unit employees vitiates the Petitioner's ostensible majority and that a new election is warranted.

In each of the cases cited by the Employer, employee turnover was only one of several factors relied upon by the court in finding that the employers involved had a good faith doubt of the union's majority status. In the underlying Board cases, [5]/ the Board, contrary to the subsequent opinions of the Courts, held that new employees are presumed to support a union in the same ratio as those whom they replace and that evidence of employee turnover is not probative of the existence of a good faith doubt of a union's majority status. Moreover, the Board has more recently held that the direction of a new election is not warranted despite the passage of time and employee turnover since an initial election. *The Child's Hospital*, 310 NLRB 560, fn. 1 (1993) corrected decision at 325 NLRB 1268. See also, *Heartshare Human Services of New York*, 317 NLRB 611 (1995). Although in *Dalewood* and *Burns*, the Courts considered employee turnover in assessing the employers' good faith doubt of the unions' majority status, I am constrained to follow Board precedent in this matter. *Club Cal-Neva*, 231 NLRB 22, fn. 5 (1977). I conclude, therefore, that the evidence of employee turnover is not probative of whether the Petitioner represents a majority of employees in the Unit. Accordingly, I find that Objection 2 does not raise any substantial or material issues affecting the results of the election and it will be overruled.

ORDER [6]/

[5]/ *Dalewood Rehabilitation Hospital*, 224 NLRB 1618 (1976) and *Burns International Security Services*, 225 NLRB 271 (1976).

[6]/ Under the provisions of Section 102.69 of the Rules, a request for review of this Second Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington by **January 23, 2001**.

IT IS HEREBY ORDERED that Objection 1 be, and it hereby is, sustained; that the election conducted in this matter on August 2, 1995 be, and it hereby is, set aside; and that a second election be conducted as hereinafter directed.

IT IS FURTHER ORDERED that Objection 2 be, and it hereby is, overruled.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of second election to be issued subsequently, subject to the Board's Rules and Regulations. Section 103.20 of the Board's Rules and Regulations requires that the Employer shall post copies of the Board's official notice of election in conspicuous places at least 3 full working days prior to 12:01 a.m. on the day of the election. The term "working day" shall mean an entire 24-hour period, excluding Saturdays, Sundays and holidays. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Second Supplemental Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **General Drivers, Warehousemen & Helpers Local Union 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO**.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No.

Under the provisions of Section 102.69(g) of the Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Second Supplemental Decision, are not part of the record before the Board unless appended to the request for review or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Second Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Second Supplemental Decision **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election subject to the Petitioner's submission of an adequate showing of interest. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **January 16, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Dated at Cincinnati, Ohio this 9th day of January 2001.

Richard L. Ahearn, Regional Director
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